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Supreme Court, U.S.
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No. 95-1929

IN THE

Supreme Court of the United States

October Term, 1995

MARY McCABE, AS ADMINISTRATRIX
OF THE ESTATE OF RUCHLA "ROSE" ZINGER,
Petitioner,

v.

THE CITY OF LYNN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND RESPONSE TO BRIEF OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION, IN SUPPORT OF PETITION

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RESPONDENT'S OBJECTION TO MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* OF THE MENTAL HEALTH LEGAL ADVISORS COMMITTEE, THE BAZELON CENTER FOR MENTAL HEALTH LAW, AND COMMISSION ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, NEW ENGLAND REGION, IN SUPPORT OF PETITION

In accordance with Supreme Court Rule 37.5, the City of Lynn ("City"), Respondent in this matter, having declined to give consent, objects to the motion of the *Amici Curiae* for leave to file an *Amicus Curiae* brief in support of Petitioner. In support hereof, the City files its Response to the Brief *Amicus Curiae*, attached hereto.

The City objects for the following reasons, as detailed in the City's attached Response:

1. Reason 1 of the *Amicus Curiae* brief, that the First Circuit departs from the "special needs" decisions of this Court, is violative of Supreme Court Rule 37.1, as it brings nothing to the attention of this Court not already brought to its attention by the parties.
2. *Amici*'s Claim in Reason II of their brief that the First Circuit erred in interpreting § 12(a) of Mass. Gen. Laws Ann. ch. 123 to authorize warrantless searches and seizures is improper for multiple reasons: (1) It presents an issue not disputed before this Court by the Petitioner; (2) It is not an issue fairly within the Question Presented; (3) Moreover, even if the State statute required a warrant in these circumstances, a search in the absence of a warrant would present an issue of state law, not a constitutional question within the federal Fourth Amendment context of this judgment. In any event, the First Circuit's interpretation of § 12 is sup-

ported by traditional rules of statutory construction, and the elementary maxim: "expressio unius est exclusio alterius." Thus, this argument of *Amici* brings nothing relevant to the attention of this Court and is violative of Supreme Court Rule 37.1

3. *Amici*'s claim in Reason II of their brief, that the First Circuit was incorrect in stating that a pink paper can be authorized only by a licensed psychiatric physician, at best only addresses dictum, not essential to this judgment, because there is no dispute that the pink paper in this case was issued by a licensed psychiatric physician. Thus, this argument of *Amici* brings nothing relevant to the attention of this Court, and is violative of Supreme Court Rule 37.1.
4. *Amici* claim in Reason II of their brief of purported inadequacies of medical professionals in issuing pink papers does not impugn the First Circuit's "special needs" analysis. To the extent that such examples suggest any weakness in individual professionals in dealing with the mentally ill, they appear irrelevant, as the determination of "reasonableness" in the context of special needs search procedures looks to "essential systemic attributes" and not to individual performers. The claimed deficiencies are well within the mechanisms of the State to address, as Massachusetts law demonstrates, and concepts of federalism and the reserved powers of the state dictate that such adjustments are not the role of the Fourth Amendment.

In summary, the *Amici* bring nothing to the attention of this Court not already presented by the parties, and their claims are

neither relevant to this litigation nor to the judgment. Accordingly, it is respectfully submitted that the motion of the *Amici* for leave to file their brief *Amicus Curiae*, be denied.

Respectfully submitted,

/s/_____

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TABLE OF CONTENTS

Argument 1

I. Reason I of the *Amicus Curiae* brief, that the First Circuit departs from the "special needs" decisions of this Court, is violative of Supreme Court Rule 37.1 1

II. The arguments of the *Amici* that the First Circuit erred in interpreting that § 12(a) of Mass. Gen. Laws Ann. ch. 123 authorizes warrantless searches and seizures; and in stating that only a licensed psychiatric physician can authorize a pink paper, are without merit for several reasons . . 2

A. *Amici*'s Claim that the First Circuit Erred in Interpreting § 12(a) to Authorize Warrantless Searches and Seizures 3

B. *Amici*'s Claim that the First Circuit Was Incorrect in Stating That a Pink Paper Can Be Authorized Only By a Licensed Psychiatric Physician 7

III. The purported inadequacies of medical professionals in issuing pink papers do not impugn the First Circuit's "special needs" claims 8

Conclusion 11

TABLE OF AUTHORITIES CITED

CASES.

Briggs v. Sullivan, 954 F.2d (9th Cir. 1992) 9n

Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983) 10n

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 9n

E & T Realty v. Strickland, 830 F.2d 1107 (11th Cir. 1987) 9n

Equal Employment Opportunity Commission v. Wyoming, 460 U.S. 226 (1982) 10n

Grandy v. Florida, ___ U.S. ___, 114 S.Ct. 2647 (1994) 7n

Griffin v. Wisconsin, 483 U.S. 868 (1987) 2n, 3n

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) . 10n

Opinion of the Justices, 309 Mass. 571, 34 N.E.2d 527 (1941) 6

Reida v. Cape Cod Hospital, 36 Mass. App. Ct. 553, 634 N.E.2d 122 (1994) 10n

Stickel v. United States, 76 S.Ct. 1067 (1956) 7n

Texas v. Hopwood, ___ U.S. ___, 1996 WL 227009 (July 1, 1996) 7n

United States v. Azeem, 946 F.2d 13 (2d Cir. 1991) . . 6

United States v. Armstrong, ___ U.S. ___, 116 S.Ct. 1480 (1996) 9

United States v. Chemical Foundation, Inc., 272 U.S. 1 (1926) 9

STATUTES & CONSTITUTIONAL PROVISIONS

Constitution of the United States
Fourth Amendment . . . . . *passim*

Massachusetts General Laws

ch. 123, § 2 9
ch. 123, § 12(a) . . . . . *passim*
ch. 123, § 12(e) 4, 5
ch. 221, § 34E 10n

Other Authorities

Supreme Court Rule 37.1 . . . . . 1, 2
Supreme Court Rule 14(a) 3n
104 Code of Massachusetts Regulations, § 3 9
Black's Law Dictionary (6th ed.) 7
2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, §§ 47.23, 47.25 (5th ed. 1992) . . 6

The *Amici* seek to bring to this Court an *Amicus Curiae* brief offering two captioned Reasons for Granting the Writ. The City responds here to the points offered in those reasons.

ARGUMENT

I. Reason I of the *Amicus Curiae* Brief, That the First Circuit Departs From the "Special Needs" Decisions of This Court, Is Violative of Supreme Court Rule 37.1

The *Amici* say, as their first Reason for granting the writ, that the First Circuit "eviscerates the Fourth Amendment warrant requirement" (*Amicus* Br. at 2) through "a significant departure" from the special needs decisions of this Court. (*Id.* at 4). In offering this Reason, the *Amici* employ the same decisions, draw the same factual distinctions, and make the identical arguments made by the Petitioner in her Reason II for granting the writ. The Petitioner had argued under the caption, "The Decision Below Is An Unjustified Deviation From Consistent Precedent." (Pet. at 9, *see* 9-10). Only the phrasing differs.

The City has already responded to these arguments in its Brief in Opposition to the petition, detailing why this decision of the First Circuit is a proper application of the "special needs" exception to the warrant requirement of the Fourth Amendment. (City's Opp. Br. at 7-12).

Supreme Court Rule 37.1 provides:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

A careful reading of *Amici*'s Reason I discloses there is nothing therein that has not already been brought to the attention of this Court by the parties. Thus, as respects Reason I, *Amici*'s brief is violative of Supreme Court Rule 37.1. Reason I appears to be nothing more than a vote by the *Amici* that certiorari be granted.[1]

II. The Arguments of the *Amici* That the First Circuit Erred in Interpreting That § 12(a) of Mass. Gen. Laws Ann. ch. 123 Authorizes Warrantless Searches and Seizures; and In Stating That Only a Licensed Psychiatric Physician Can Authorize a Pink Paper, Are Without Merit for Several Reasons.

In Part A of Reason II, the *Amici* say that the First Circuit "misreads" the State statute in two particulars. First, the *Amici*

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[1] The *Amici* chide the First Circuit for reliance on *Griffin* v. *Wisconsin*, 483 U.S. 868 (1987), saying that the First Circuit "makes no attempt to explain how *Griffin* could apply in a civil commitment context where the determinative 'criminal sanction' is lacking." (*Amicus* Br. at 5). The *Amici*, as did the Petitioner, pull a circumstance from *Griffin* and read it myopically. (*See* City's Opp. Br. at 9-10).

Even if "criminal sanction" was a "determinative" factor in *Griffin*, it does not provide the doctrinal limit of the "special needs" exception in other applications. And contrary to the *Amici*'s criticism, the First Circuit repeatedly explains how and why the tenets of a "special needs" search, as applied in *Griffin*, are applicable to the circumstances of this case. *See, e.g.*:

i. *Griffin* recognizes that a " 'special need' . . . [could] be undermined systemically by an impracticable warrant or probable-cause requirement," *McCabe*, 77 F.3d at 545 (Pet. 10a);

ii. "[R]igid adherence to a warrant requirement reaches its most suspect extreme where a judicial officer lacks the innate expertise to assess the soundness of the basic ground upon which the warrant request is predicated," *id*. at 550 (Pet. 22a-23a);

iii. "[S]uperimposing . . . a judicial factfinding mechanism upon the evaluation made by the licensed psychiatric physician in the involuntary commitment context . . . in emergent circumstances [would, as in the *Griffin* context] 'interfere to an appreciable degree' " with the State's special need, *id*. at 551 (Pet. 26a) (quoting and analogizing to *Griffin*);

iv. "Unlike the characteristic relationship between law enforcement personnel and criminal suspects, a committing physician's relationship with a patient, or even a

say that the First Circuit erred in interpreting that § 12(a) of Mass. Gen. Laws Ann. ch. 123, "implicitly" authorizes warrantless searches and seizures. (*Amicus* Br. at 7). Second, the *Amici* say that the First Circuit was incorrect in stating that "a pink paper can be authorized *only by a licensed psychiatric physician.' . . .*" (*Amicus* Br. at 7, quoting First Circuit) (emphasis by *Amici*).

A. Amici's *Claim that the First Circuit Erred in Interpreting § 12(a) to Authorize Warrantless Searches and Seizures.*

Although the City details below that the First Circuit's conclusion that § 12(a) authorizes warrantless searches and seizures is fully consistent with elementary principles of statutory construction, it should be noted initially that the *Amici*'s argument that the First Circuit erred in this construction is improper for multiple reasons: (1) It presents an issue not disputed before this Court by the Petitioner. The Petitioner does not dispute the First Circuit's statutory construction, but maintains that a warrant was required under the Fourth Amendment.[2] (2) It is not an issue fairly within the Question Presented.[3] Whether or not the State statute authorizes a warrantless search and seizure is not relevant respecting the question presented: whether the First Circuit "creat[ed] a new and unprecedented exception to the . . . Fourth Amendment" warrant requirement. (Question Presented, Pet. at *i*). (3) Moreover, even if the State statute required a warrant in these circumstances, a search in the absence of a warrant would present an issue of state law, not

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nonpatient, is in no sense adversarial . . . [and is constrained by] ethical responsibilities," *id.* at 552 (Pet. 28a) (specifically recognizing *Griffin*'s concern respecting the degree of impartiality of the decision maker).

[2] *See* City's Opp. Br. at 4 and note 4.

[3] "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14(a).

a constitutional question within the federal Fourth Amendment context of this judgment. The issue for this Court is whether the Fourth Amendment requires a warrant.

In any event, the First Circuit was correct in its statutory construction. Contrary to the bold declaration by the *Amici* that "[t]he statute *expressly* contemplates that, in circumstances such as these, a judge should consider the evidence presented for involuntary commitment," the statute does no such thing. (*Amicus* Br. at 7) (emphasis added). *Amici* rely on the express provision for a warrant found in § 12(e). (*Amicus* Br. at 7, citing § 12(e)).[4] But, the express provision of a warrant requirement in § 12(e), contrasted by the absence of such language in § 12(a), argues against the *Amici*.

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[4] The *Amici* also rely on the district court's opinion that § 12(a), read without inferring a warrant requirement, would be violative of the Fourth Amendment. (*Amicus* Br. at 7). Thus, the district court provided a "saving constitutional interpretation [that] [a] warrant would be required whenever it is clear that a 'pink paper' will not be voluntarily complied with, that police officers will be involved, and force is threatened." *McCabe*, 875 F.Supp. at 62, n.11 (Pet. 35a). The City argued successfully before the First Circuit that the district court's "saving" construction:

> would virtually stop the Commonwealth's response to emergency commitments. The circumstances the district court imposes as requiring a warrant are the usual circumstances of emergency commitment. Indeed, in the context of emergency involuntary commitments the reasonable inference is that consent will not be forthcoming and force will be necessary, otherwise it would not be involuntary. Likewise, it is reasonable to infer that police will be involved in the usual case. In our society a properly constituted constabulary traditionally has been called upon in emergency.
>
> The district court's ruling is mechanical and unduly restrictive. The construct clearly places a substantial procedural impediment to timely emergency response, and is thus violative of the flexibility due the state. . . . The ruling offends federalism, invading the state's *parens patriae* and police powers of "preventing serious bodily harm by mentally disturbed individuals to themselves or others." It leaves the City of Lynn and its police with the conundrum of performing these important and pressing state functions and violating federal civil rights law for doing so. The foreseeable result is paralyzation of the state's reasonable emergency response mechanisms to dangerous mentally ill persons.

(City's Br. 1st Cir. at 23-24) (citations and footnotes omitted).

Section 12(e) provides a category of civil commitment which may be initiated by "*Any person*" upon application to a designated court. *Id.* (emphasis added). The City argued below that § 12 requires a warrant only when an application for a ten-day commitment is made under § 12(e), and not for emergency commitments under § 12(a). The City argued that it is clear, as a matter of statutory construction, that the Massachusetts Legislature did not intend the delay of a warrant procedure in § 12(a) hospitalizations. Having provided a warrant procedure in § 12(e), the Legislature certainly could have done so in § 12(a) had such a procedure been intended. The City argued that the legislative intent not to require a warrant in § 12(a) searches and seizures is reasonably premised on at least two important distinctions. First, unlike the application of lay persons under § 12(e), the physician employs objective professional judgment in the determinations of mental illness and the risk of serious harm. Second, because of "the emergency nature of the case" in the instance of a recalcitrant and dangerous mentally ill person, § 12(a), a warrant procedure is neither practical nor constitutionally required. (City's Br. 1st Cir. at 15).

The First Circuit adopted this interpretation, referring to the emergency commitment of a recalcitrant and dangerous mentally ill person as a "category 2" commitment procedure, and the lay procedure of § 12(e) as a "category 4" commitment. 77 F.3d at 547-48 (Pet. at 16a-17a).[5] The First Circuit correctly reasoned:

> As only the category 4 commitment procedure expressly incorporates a warrant requirement, we think it clear that the statute implicitly authorizes warrantless searches and seizures in the three remaining contexts.

[5] The First Circuit parsed the statute as providing four categories of civil commitment procedures. *Id.*

Id. at 548 (Pet. at 17a).[6]

The First Circuit's interpretation of § 12 is supported by traditional rules of statutory construction, and the elementary maxim: "expressio unius est exclusio alterius" recognized in both federal and state courts. *See* 2A Norman J. Singer, *Sutherland on Statutes and Statutory Construction*, §§ 47.23, 47.25, at 217, 234 (5th ed. 1992). *See, e.g.*:

> In general, congressional consideration of an issue in one context, but not another, in the same or similar statutes implies that Congress intends to include that issue only where it has so indicated.

United States v. *Azeem*, 946 F.2d 13, 17 (2d Cir. 1991);

> [T]he general principle or rule, frequently stated by this court, [is] that where, in a statute, an express limitation or proviso is made with reference to a given subject matter, and, in the same statute, no such limitation or proviso is made applicable to a related subject matter, the absence of the limitation or proviso in the second instance is a strong indication that it is not intended to apply, or, by implication, that it is excluded.

Opinion of the Justices, 309 Mass. 571, 605, 34 N.E.2d 527, 547 (1941) (Cox, J.).

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[6] The First Circuit specifically noted that as the pink paper was issued under category 2, "[t]he only question before us, therefore, concerns the constitutionality of the 'category 2' warrantless search procedure." *Id.*

B. Amici's *Claim that the First Circuit Was Incorrect In Stating That a Pink Paper Can Be Authorized Only By A Licensed Psychiatric Physician.*

The *Amici* correctly note that the First Circuit stated that "a pink paper can be authorized only by a licensed psychiatric physician. . . ." 77 F.3d at 551 (Pet. at 25a) (*Amicus* Br. at 7). It is true that the First Circuit did not include in the passage quoted by *Amici* the statutory references of § 12(a) to "psychologist" and "psychiatric nurse." But this is hardly of consequence because there is no dispute that in this case the pink paper was in fact issued by a licensed and qualified psychiatrist.[7] It is clear that the focus of the court, as it must have been, was on the facts and circumstances of the case before it, thus its repeated references to a "licensed" or "qualified" "physician." In parsing § 12(a) earlier in the opinion, and identifying the four categories of commitment, the First Circuit did include "psychologist" and "psychiatric nurse" in "category 2." *Id.* at 547 (Pet. at 16a). Thus, it appears that it was open to *Amici* to reference them. But again, this is of no consequence to this judgment. To the extent that the First Circuit's references to "category 2" searches and its "holding"[8] may be read as inclusive of pink papers issued by other than a qualified physician, it is dictum, not "essential to the determination of the case . . . and lack[ing] the force of an adjudication." *Black's Law Dictionary* (6th ed.) (Dictum).[9]

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[7] *See* pink paper in which Dr. Barden indicates he is both a "Licensed Physician" and "Qualified Physician." (Pet. at 66a).

[8] In its statement of "holding" the First Circuit does reference "category 2" pink papers. 77 F.3d at 554 (Pet. at 32(a)).

[9] "Dictum" in circuit court opinions presents "nothing reviewable by this Court." *Stickel* v. *United States*, 76 S.Ct. 1067, 1068 (1956) (Harlan, J. on denial of application for bail). "This Court 'reviews judgments, not statements in opinions.'" *Grandy* v. *Florida*, ___ U.S. ___, 114 S.Ct. 2647, 2653 (1994) (citations omitted); *Texas* v. *Hopwood*, ___ U.S. ___, 1996 WL 227009, No. 95-1773 (July 1, 1996) (Ginsburg, J., and Souter, J., on denial of certiorari).

In any event, there is no showing in this litigation respecting any systemic inadequacy of these medical professionals or that pink papers issued by such statutorily designated and qualified professionals would be so lacking in reliability as to not be within a reasonably designed and regulated system. (*See* Argument III below).

III. The Purported Inadequacies of Medical Professionals in Issuing Pink Papers Do Not Impugn the First Circuit's "Special Needs" Analysis.

In part B of Reason II, the *Amici* say that the First Circuit misunderstood the inadequacies of medical personnel in issuing pink papers. (*Amicus* Br. at 6). *Amici* offer "case" examples of these inadequacies — a "parade of horribles." To the extent that such examples suggest any weakness in individual professionals in dealing with the mentally ill, they appear irrelevant, as the determination of "reasonableness" in the context of special needs search procedures looks to "essential systemic attributes" and not to individual performers. 77 F.3d at 549 (Pet. at 21a).

The systemic attributes of the search procedure are apparent. Massachusetts law mandates that the Commonwealth's Department of Mental Health establish procedures for administration of the mentally ill, and the qualification, designation, and review of medical professional performance under § 12(a):

> The department shall . . . adopt regulations consistent with this chapter which establish procedures and the highest practical professional standards for the reception, examination, treatment, restraint, transfer and discharge of mentally ill persons in departmental facilities. Said regulations shall be adaptable to changing conditions and to advances in methods of care and treatment of the mentally ill.

Mass. Gen. Laws Ann. ch. 123, § 2. The Department of Mental Health has promulgated regulations pursuant to this statutory charge. 104 Code of Massachusetts Regulations ("CMR"), § 3. The First Circuit was entitled to rely on the integrity of the Massachusetts legislative scheme and a reasonable expectation of appropriate professional and ethical performance.[10] *Cf. United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the offical acts of public officers and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."); *United States* v. *Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 1486 (1996) (presumption of regularity applied to prosecutorial decisions).

While the individual departures from appropriate professional conduct proffered by the *Amici* are to be regretted, the Constitution does not, nor can it require perfection.[11] State mechanisms and remedies to adjust such lapses as a guard against inadequate performance, despite the protestations of the *Amici*, appear to be reasonably available.[12] They are available not only through the oversight of the Massachusetts Department

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[10] Of course, the "examples" proffered here by the *Amici* are purely hypothetical in the context of this litigation.

[11] *See, e.g., Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986) ("the Constitution entitles a criminal defendant to a fair trial, not a perfect one"); *E & T Realty* v. *Strickland*, 830 F.2d 1107, 1114 (11th Cir. 1987) (the Constitution does not require perfect application); *Briggs* v. *Sullivan*, 954 F.2d 534, 540 (9th Cir. 1992) ("the Constitution only requires the government to take reasonable measures, not perfect ones").

[12] The First Circuit carefully considered that "judicial oversight might provide some preliminary insulation against obvious abuse;" but, in balance, determined the "statutory mechanism itself affords reasonable safeguards against such concerns." 77 F.3d at 551 (Pet. at 25a):

> We discern no sufficient justification for superimposing such a judicial fact finding mechanism upon the evaluation made by a licensed psychiatric physician in the involuntary commitment context, especially since it promises no corresponding systemic benefit to offset the systemic delays in executing pink papers in emergent circumstances.

Id. at 551 (Pet. at 26a).

of Mental Health, and its echelons, but through established civil law. *See Reida* v. *Cape Cod Hospital*, 36 Mass. App. Ct. 553, 634 N.E.2d 122 (1994) (demonstrating availability of state tort action). Indeed, *Amicus*, Mental Health Legal Advisors Committee, which was created and empowered by the Massachusetts Legislature to render advice and protect the interests of the mentally ill,[13] which it does vigorously in many quarters including the courts, is a component of the Commonwealth's oversight, and demonstrates the legislative commitment of the Commonwealth of Massachusetts to the welfare of the mentally ill and those who may be affected by them.

Without doubt, any system can be improved. But our system of federalism not only permits, but relies on the several states to work such advances.[14] The Constitution of the United States is not an instrument to perform fine tuning.[15] With due respect, it may be that the energies and resources of the Mental Health Legal Advisors Committee would be spent more appropriately in seeking at the state level advancement on the deficiencies that they perceive.

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[13] Mass. Gen. Laws Ann. ch. 221, § 34E.

[14] Flexibility for experimentation not only permits each state to find the best solutions to its own problems, it is the means by which each state may profit from the experience and activities of all the rest." *Equal Employment Opportunity Commission* v. *Wyoming*, 460 U.S. 226, 265 (1982) (Burger, C.J., Powell, J., Rehnquist, J., O'Connor, J., dissenting, speaking of the reserved powers of the state and Justice Brandeis' concept of federalism in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 311 (1932)).

[15] *Cf. Community for Creative Non-Violence* v. *Watt*, 703 F.2d 586, 626 (D.C. Cir. 1983) (Scalia, J., MacKinnon, J., Bork, J., dissenting) ("[I]t is not the function of the Constitution to make such fine judgments; nor is it within the practical power of the courts to apply them. There is a gap between what the Constitution requires and what perfect governance might sometimes suggest. . . .").

CONCLUSION

For all the above reasons, and those stated in the City's Brief in Opposition to the petition, the writ of certiorari should be denied.

Respectfully submitted,

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